STATE OF MICHIGAN

COURT OF APPEALS

NANCY HELZER, Plaintiff-Appellant,	UNPUBLISHED June 8, 1999
v	No. 205805 Macomb Circuit Court
CBS BORING & MACHINE CO, INC., and DAVID FARMER, jointly and severally, Defendants-Appellees.	LC Nos. 95-004383 NO 95-003719 NO

Before: Bandstra, C.J., and Markey and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting summary disposition to defendants on plaintiff's claims of negligence, intentional infliction of emotional distress, intentional tort, and intentional interference with a prospective civil action. We affirm.

I

Standards of Review

The trial court granted summary disposition to defendant Farmer on all four counts of plaintiff's complaint and to defendant CBS on counts II (intentional infliction of emotional distress), III (intentional tort), and IV (intentional interference with a prospective civil action) pursuant to MCR 2.116(C)(8) (failure to state a claim). A grant or denial of summary disposition based upon a failure to state a claim is reviewed de novo on appeal. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Simko v Blake*, 448 Mich 648; 654; 532 NW2d 842 (1995). All factual allegations in support of the claim are accepted as true, and the motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.*

In granting summary disposition to defendant Farmer on plaintiff's negligence claim, the court examined the meaning and scope of count I of plaintiff's complaint. Decisions concerning the meaning

and scope of pleading is within the discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

The trial court also granted summary disposition to defendant CBS on plaintiff's negligence claim (Count I) pursuant to MCR 2.116(C)(10) (no genuine issue as to any material fact). On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id*. When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, admissions, and other documentary evidence available to it. *Id*.

II

Defendant Farmer: Count I - Negligence

Plaintiff first asserts that the trial court erred in granting summary disposition to defendant Farmer with respect to her negligence claim. We disagree. To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). In the present case, plaintiff's negligence claim against Farmer is based on premises liability. Premises liability is conditioned upon the presence of both possession of and control over the premises. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998), quoting *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980). Title to the property is unnecessary; instead, liability depends upon actual possession and control. *Kubczak, supra* at 662, quoting *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942).

Although we recognize that plaintiff has alleged in her complaint a duty and breach of duty on the part of defendant Farmer, we agree with the trial court that plaintiff did not allege that defendant Farmer possessed and controlled the premises. Further, the trial court correctly found that plaintiff had failed to allege in her complaint that her injuries had been proximately caused by defendant Farmer's negligence. Thus, the trial court did not abuse its discretion in concluding that plaintiff had failed to allege a premises liability theory against defendant Farmer. *Weymers, supra*. The trial court properly granted summary disposition to defendant Farmer based upon plaintiff's failure to state a claim.

III

Defendant CBS: Count I - Negligence

Plaintiff argues that the trial court erred in granting summary disposition to defendant CBS. We disagree. As already stated above, plaintiff must prove four elements in order to establish a negligence claim: duty, breach of duty, causation, and damages. *Schultz, supra*. No one asserts in this case that defendant CBS did not have both possession of and control over the premises. *Kubczak, supra* at 660. With respect to the duty element of negligence, a premises owner's duty to exercise reasonable care to protect invitees only extends to risks "that the owner knows or should know the invitees will not

. . . protect themselves against." *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 532; 542 NW2d 912 (1995). Similarly, under the "inherently dangerous activity doctrine" liability cannot be imposed against the employer of an independent contractor where reasonable safeguards against injury could have been provided by taking well-recognized measures and an experienced contractor was selected. *Funk v General Motors Corp*, 392 Mich 91, 110; 220 NW2d 641 (1974); see, also, *Rasmussen v Louisville Ladder Co, Inc*, 211 Mich App 541, 549; 536 NW2d 221 (1995), quoting *Szymanski v K mart Corp*, 196 Mich App 427, 431-432; 493 NW2d 460 (1992), vacated and remanded on other grounds 442 Mich 912 (1993).

Defendant CBS argues that plaintiff's accident could have been avoided altogether had she turned off the main power supply before working on the crane and that this was the standard procedure that CBS had a right to expect that plaintiff would follow as an experienced crane repair person. At her deposition, plaintiff admitted that she had been trained in "lock out and tag out procedures" and that she had been provided OSHA information regarding those procedures. She specifically stated that "what I should have done was shut off [the] main line, okay" and "I know, okay, that the main line disconnect should have been cut off." On the basis of these admissions, we conclude that there is no factual dispute that shutting off the main power before working on the crane was a well-recognized safety measure in the industry that defendant CBS could reasonably have expected plaintiff would undertake.[1] Further, there is no dispute that, had the main power line been shut off, the accident would not have occurred. Accordingly, the trial court properly granted summary disposition.[2]

IV

Defendants Farmer and CBS: Count II - Intentional infliction of emotional distress

Plaintiff also asserts that the trial court erred in granting summary disposition to defendants pursuant to MCR 2.116(C)(8) because plaintiff sufficiently alleged an intentional infliction of emotional distress claim. We disagree. "To establish a prima facie case of intentional infliction of emotional distress, the plaintiff must show four elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Smith v Calvary Christian Church*, 233 Mich App 96, 113; ___ NW2d ___ (1998). "Liability for such a claim has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Id*., quoting *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996). Liability "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985), quoting Restatement Torts, 2d, § 46, comment d, pp 72-73; *Linebaugh v Sheraton Mich Corp*, 198 Mich App 335, 342; 497 NW2d 585 (1993).

In *Taylor v Blue Cross and Blue Shield of Michigan*, 205 Mich App 644, 646-648, 657; 517 NW2d 864 (1994), this Court refused to conclude that the defendant's conduct was outrageous even though the defendant's conduct of erroneously refusing to pay for the plaintiff's chemotherapy treatments resulted in delayed treatments which caused the plaintiff's cancer to spread throughout her body. In addition, our Court has also held that severe verbal abuse, including ethnic slurs, at work does

not constitute outrageous conduct. *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 346-347; 483 NW2d 407 (1992). In another case involving the Detroit News publicizing the plaintiffs' location after death threats were made against the plaintiffs, this Court held that the conduct of the Detroit News was not sufficiently outrageous or extreme, and the trial court did not err in granting summary disposition to the Detroit News. *Duran v The Detroit News Inc*, 200 Mich App 622, 630; 504 NW2d 715 (1993).

In reviewing an intentional infliction of emotional distress claim upon a summary disposition motion, the trial court determines as a matter of law whether the defendant's conduct may be properly regarded as sufficiently extreme and outrageous. *Doe v Mills*, 212 Mich App 73, 92; 536 NW2d 824 (1995); *Duran, supra*. Construing the factual allegations in plaintiff's complaint as true, *Simko, supra,* and comparing the allegations of the present case to those in the above cited cases, we conclude that defendants' conduct of trying to conceal the evidence and writing the letter to plaintiff's employer could not properly be considered "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Smith, supra* at 113. The trial court did not err in granting summary disposition to defendants on plaintiff's intentional infliction of emotional distress claim.[3]

V

Defendants Farmer and CBS: Count III - Intentional tort

This Court need not address this issue because plaintiff has voluntarily abandoned this argument on appeal.

VI

Defendants Farmer and CBS: Count IV - Intentional interference with a prospective civil action

Plaintiff also argues that the trial court erred in granting summary disposition to both defendants pursuant to MCR 2.116(C)(8) on her intentional interference with a prospective civil action by spoliation of evidence. We disagree. Specifically, plaintiff asserts that defendants had David Brom switch the electrical plugs to their correct positions after the accident so as to conceal the fact that the plugs were in their incorrect positions when plaintiff was electrocuted. In granting summary disposition, the trial court relied upon *Panich v Iron Wood Products Corp*, 179 Mich Ap 136; 445 NW2d 795 (1989), in stating that Michigan does not recognize the tort of intentional interference with a prospective civil action by spoliation of evidence.

In *Panich, supra* at 137-138, the plaintiff was injured at work when an electrical box exploded. During the plaintiff's absence from work, the defendant, plaintiff's employer, disposed of the electrical box. *Id*. at 138. The plaintiff sued the defendant, alleging negligence and intentional interference with an economic advantage. *Id.* The plaintiff asserted that the defendant intentionally disposed of the electrical box after knowing that the plaintiff had a potential third-party claim against the manufacturer of the box. *Id*. After recognizing that only two other states had recognized the separate

tort of intentional interference with a prospective civil action by spoliation of evidence, this Court declined to create such a tort. *Id.* at 142-143.

Although plaintiff may be correct in stating that *Panich* is distinguishable from the present case because it was not in the defendant's interest in *Panich* to destroy the evidence whereas in the present case, it was in defendant CBS' interest, Michigan has already devised a method for dealing with such situations. "The rule is well established that where there is a deliberate destruction of or failure to produce evidence in one's control[,] a presumption arises that if the evidence were produced[,] it would operate against the party who deliberately destroyed or failed to produce it." *Johnson v Secretary of State*, 406 Mich 420, 440; 280 NW2d 9 (1979); see, also, *Lagalo v The Allied Corp (On Remand)*, 233 Mich App 514, 520; ___ NW2d ____ (1999) ("the intentional spoliation or destruction of evidence raises the presumption against the spoliator where the evidence was relevant to the case . . ."); *Hamann v Ridge Tool Co*, 213 Mich App 252, 255; 539 NW2d 753 (1995). We conclude that, this remedy being available, no separate intentional interference/spoliation claim need be recognized. Thus, the trial court did not err in dismissing plaintiff's intentional interference with a prospective civil action by spoliation of evidence because Michigan does not recognize a separate tort for such a claim.

We affirm.

/s/ Richard A. Bandstra
/s/ Jane E. Markey
/s/ Michael J. Talbot

[1] Plaintiff also stated that this was not what was normally done at Continental Crane. This is irrelevant to determining the well-recognized safety measures generally employed in the crane repair industry. Plaintiff also claims that the deposition testimony of David Brom supports an argument that disconnecting the main power line was not the industry standard. However, Brom's background, training, and credentials are not revealed by the record. Further, the only relevant assertion Brom made at his deposition was that, in some circumstances where the main power line was not readily accessible, it might be "easier" to attempt a repair without disconnecting it. Again, that has nothing to do with whether that approach would be proper or consistent with industry safety standards.

[2] The trial court relied on a "sophisticated user doctrine" analysis. See, e.g., *Portelli v I R Construction Products Co, Inc*, 218 Mich App 591, 599-603; 554 NW2d 591 (1996); *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 146-149; 530 NW2d 510 (1995). Defendant argues that this analysis is analogous to the reasoning we employ here. In any event, we will not reverse a summary disposition granted properly, albeit for the wrong reason. *Stevens Mineral Co v Michigan*, 164 Mich App 692, 699-700; 418 NW2d 130 (1987); see, also, *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

[3] Further, we concluded earlier that defendants could not be liable for plaintiff's accident. Given that, we question whether defendants' conduct in denying liability or covering up their involvement in the accident, even if sufficiently extreme and outrageous, could form the basis for an intentional infliction of emotional distress claim.